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No. 02-

IN THE

# Supreme Court of the United States

ROBERT BRUCE CRAFT,

*Petitioner,*

*v.*

STATE OF GEORGIA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STATE OF GEORGIA

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The questions presented turn on the constitutionality of child-pornography statutes as they have been applied to the petitioner. This Court has rejected a number of facial challenges to child-pornography statutes, trusting the states and lower federal courts to abstain from unconstitutionally expansive construction of such statutes. As the present case illustrates, that trust has not always been merited. Child pornography law has come to threaten valuable and constitutionally protected speech. The questions here are:

1. Whether the First Amendment prohibits a child-pornography conviction for a picture that is not lewd on its face.

2. Whether the First Amendment and the due process clause of the Fifth Amendment prohibit upholding a child- pornography conviction on the basis of "weak and unsatisfactory" evidence of lustful disposition.

3. Whether the First Amendment requires a court to determine by independent review whether particular pictures objectively constitute child pornography or child molestation.

4. Whether the First Amendment requires such independent review to be performed in accordance with the heretofore uniformly-adopted guidelines first set out in *United States v. Dost*, 636 F. Supp. 828 (S.D.Cal. 1986).

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Dr. Robert Bruce Craft, the petitioner, respectfully requests that a writ of certiorari be issued to review the judgment of the Court of Appeals of Georgia.

## OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at *Craft v. State*, 252 Ga. App. 834, 558 S.E.2d 18 (2001) (App. A). The order denying reconsideration will not be officially reported. (App. B). The denial of certiorari by the Supreme Court of Georgia in *Craft v. State*, Case number S02C0654, has not yet been officially reported, but may be found at 2002 Ga. LEXIS 418 (App. C). The denial of reconsideration from denial of certiorari will not be officially reported. (App. D). The trial court entered no published opinions in *State v. Craft*, Richmond County Superior Court Indictment Number 99-RCCR-50, Columbia County Superior Court Indictment Number 99-CR-931 (consolidated by consent).

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on November 9, 2001. The Court of Appeals denied a timely motion for reconsideration on December 10, 2001. The Supreme Court of Georgia denied timely cross-petitions for certiorari from both parties, by a vote of four to three, on May 13, 2002. The Georgia Supreme Court denied Craft's timely motion for reconsideration, by the same vote, on June 7, 2002.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part, "Congress shall make no law . . . abridging freedom of speech. . . ."

The Fifth Amendment to the Constitution of the United States provides, in relevant part, "No person shall . . . be deprived of life, liberty or property without due process of law. . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

Georgia's child molestation statute, O.C.G.A. § 16-6-4, provides, in relevant part,

> (a) A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.

Georgia's child exploitation statute, O.C.G.A. § 16-12-100, provides, in relevant part,

> (a) As used in this Code section, the term . . . (4) "Sexually explicit conduct" means actual or simulated: . . . (C) Masturbation; (D) Lewd exhibition of the genitals or pubic area of any person; [or] . . . (H) Defecation or urination for the purpose of sexual stimulation of the viewer; . . .
>
> (b)(5) It is unlawful for any person knowingly to create, reproduce, publish, promote, sell,

distribute, give, exhibit, or possess with intent to sell or distribute any visual medium which depicts a minor engaged in any sexually explicit conduct. . . .

(7) It is unlawful for any person knowingly to bring or cause to be brought into this state any material which depicts a minor engaged in any sexually explicit conduct.

(8) It is unlawful for any person knowingly to possess or control any material which depicts a minor engaged in any sexually explicit conduct.

## STATEMENT OF THE CASE

The Georgia appellate courts have disregarded a series of constitutional rulings of this Court. They have affirmed child-pornography convictions for pictures that include toddlers romping unclothed, pictures that the Georgia Court of Appeals acknowledges to be indistinguishable from those of a naked toddler on a bear rug. (App. B at 27a-28a). None of the pictures at issue are in any way sexual. The Georgia Court of Appeals refused to perform an independent examination of whether the pictures are lewd — notwithstanding that the decisions of this Court require such an independent examination. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 507-508 (1984); *New York v. Ferber*, 458 U.S. 747, 774, n.28 (1982). Moreover, the Court of Appeals held that innocuous photographs can be transformed into child pornography by the photographer's "lustful disposition" and further held that a fact finder may infer such a disposition from "exceedingly weak and unsatisfactory evidence." (App. A at 17a) In other words, if a Georgia jury disapproves of "the moral content of [a photographer's] thoughts," the photographer can be convicted as a child pornographer; and there is no meaningful appellate review. Cf. *Stanley v. Georgia*, 394 U.S. 557, 565 (1972);

*see also Ashcroft v. Free Speech Coalition*, __ U.S. __, 122 S. Ct. 1389, 1403 (2002).

In his directed verdict motion, Craft argued that this prosecution was violative of his due process rights under the Fifth Amendment and that Georgia's child exploitation and molestation statutes, although facially constitutional, were violative of the First Amendment as applied in his case. Trial Transcript, Vol. II, pp. 551-552. Craft raised the First Amendment again on appeal; the Georgia Court of Appeals addressed and rejected it. (App. B at 27a-28a). The propositiion that a weak and unsatisfactory evidence of a lustful disposition can support a conviction — which violates due process — appears for the first time in the opinion of the Court of Appeals.

The Court of Appeals reversed most of Craft's convictions. But it did so only on the basis of constraints in "the precise language" of Georgia's exploitation statute." (App. A at 13a). Its decision invites prosecutors to avoid those constraints in the future by using the general molestation statute instead. It rejected the proposition that additional constraints flow from the Constitution of the United States or the decisions of this Court. (App. B at 27a-28a).

**A. Investigation and prosecution**

Craft came to the attention of law enforcement when a photo lab reported a series of pictures of one of Craft's child psychology patients. Those pictures are disturbing. They depict the child playing at mutilating his genitals with a toy knife. But the child's behavior was psychosexual, not sexual. Much has been made of Craft's failure to offer the investigating officer a satisfactory explanation for his decision to photograph that behavior. But photographers rarely deliberate; they often must act quickly. Moreover, Craft, who believed the child to be abused, had a duty to be interested in the behavior. Although he did not have

a theraputic purpose in mind when he took the pictures, Craft had intended to treat them like client confidences. (App. A at 4a-5a).

There is no evidence that Craft engaged in any inappropriate use or distribution of any of the subject pictures. (See App. A at 4a-5a). Most of the hundreds of pictures at issue were among tens of thousands put back in developers' envelopes and piled up around Craft's home. (See App. A at 7a). Only two of the subject pictures, a sequence depicting a child climbing a wall in a public park for which he was acquitted, were among those Craft selected for display.

After the investigator met with Craft, he secured a warrant and seized approximately 37,000 photographs from Craft's home and office. (App. A at 7a). Two more searches followed. (App. A at 7a-8a). At trial, the prosecutor estimated that Craft had taken a total of 70,000 photographs. The state selected 616 for use at trial. (See App. A at 18a). The investigating officer testified that, apart from a few duplicates, the photographs that the state chose not to introduce were unobjectionable. The selection process was time consuming: the interval between the first search and Craft's arrest was a year and five months (App. A at 7a-8a); another ten months passed before indictment.

**B. Indictment and trial**

Craft was charged with 103 counts of child exploitation and 15 counts of molestation. (App. A at 2a, 8a-9a). All of the exploitation counts and twelve[1] of the molestation counts are

1. Although Craft's affirmed convictions of the other three counts are not subjects of this petition, a short discussion is order. All three were based on the testimony of F.R., the only child who testified.

F.R., who had stayed in Craft's home, testified that he had been very fond of Craft until an FBI agent told F.R. that Craft had molested a lot of kids and that F.R.'s testimony could help put Craft in prison. After this interview, F.R. recovered certain memories.

(Cont'd)

for picture-taking — two videotapes, the rest photographs.[2] The case was tried to a judge. Craft presented no evidence. With the exception of a single exploitation count, which contained a typographical error, Craft was convicted on all counts. (App. A at 8a-9a). Craft was sentenced to concurrent twenty-year terms of incarceration for each of the exploitation convictions and concurrent twenty-year terms on probation for each of the molestation convictions.

Most of the convictions rest on the "lewd exhibition of the genitals" prong of the exploitation statute, O.C.G.A. § 16-12-100(a)(4)(D). As to those charges, the state expressly argued that any photograph depicting any portion of a child's genitals is unlawful.

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(Cont'd)

F.R. testified that he and Craft had watched a videotape that contained a sex scene. The state had seized the videotape but did not introduce it into evidence. It was apparently a legitimate foreign-language film. Investigators testified that there was no pornography among the many videotapes seized from Craft's home.

F.R.'s mother testified that, at the time F.R. stayed in Craft's home, F.R. was emotionally young for his age and wanted company when he bathed. F.R. testified that, on an occasion when Craft bathed him, Craft fondled F.R.

F.R. testified that Craft had persuaded him to masturbate while Craft videotaped that activity. No such videotape, nor anything like such a videotape, was found among the truckloads of material seized from Craft's home.

As noted in the main text, the trial court imposed only probation for the molestation convictions. Although the molestation convictions based on F.R.'s testimony are not subjects of this petition, Craft contends that those charges derived unwarranted strength from the other counts tried along with them and that his post-judgment motion as to those three charges should be reconsidered in the trial court.

2. Copies will be lodged with the Court.

Other convictions rest on other prongs of the exploitation statute, notably "[d]efecation or urination for the purpose of sexual stimulation of the viewer." O.C.G.A. § 16-12-100(a)(4)(H). Those pictures do not involve scatological eroticism. They include fully-clothed boys urinating in the woods, photographed from behind, and a photograph of a child sitting on a toilet, with no part of his genitals or anus visible, making a comical face. (See App. A at 14a, 15a).

A dozen convictions are for photographs to which no prong of the exploitation statute is even arguably applicable. Those photographs are nudes of children positioned so that their genitals are not visible. But for the adjudication that they are child pornography, it would be difficult to imagine any forum in which their display would be inappropriate. As to these, the state invoked the general molestation statue, O.C.G.A. § 16-6-4.

### C. Decision of the Court of Appeals of Georgia

The Court of Appeals of Georgia gave short shrift to the First Amendment by applying an inappropriately deferential standard of review. The Court of Appeals did reverse 67 of the exploitation convictions. But the basis for those reversals was not the First Amendment. Instead, the Court of Appeals looked only to "the precise language" of Georgia's exploitation statute. (App. A at 13a). The Court of Appeals refused to recognize any additional constraints arising from the Constitution of the United States or the decisions of this Court. (App. B at 27a-27b).

> In the seminal case
>
> identifying a new category of unprotected expression — child pornography — the Court expressly anticipated that an "independent examination" of the allegedly unprotected material may be necessary "to assure ourselves that the judgment . . . 'does not constitute a forbidden intrusion on the field of free

> expression.'" *New York v. Ferber*, 458 U.S., at 774, n. 28 (quoting *New York Times Co. v. Sullivan*, 376 U.S., at 285).

*Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 507-508 (1984).

Notwithstanding that requirement, the Court of Appeals applied the "any evidence" standard of review. (App. A at 11a). Under that standard, findings of fact "will not be disturbed if there is any evidence to support them." (App. A at 11a) (citation omitted). The Georgia Supreme Court has equated the any-evidence standard with the clearly-erroneous standard. *Hall v. Ault*, 240 Ga. 585, 242 S.E.2d 101 (1978). Although any-evidence review resulted in some reversals, it is too deferential to satisfy this Court's requirement of an independent examination.

Because it was to applying the any-evidence standard of review, the Court of Appeals refused to adopt the standard set out in *United States v. Dost*, 636 F. Supp. 828 (S.D.Cal. 1986), *aff'd sub nom*, *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). (App. A at 10a). In *Dost*, the district court construed the federal exploitation statute, which had been amended "in line with the *Ferber* holding." *Dost*, 636 F. Supp. at 832, discussing, *New York v. Ferber*, 458 U.S. 747 (1982). The federal statute construed in *Dost* is similar to the Georgia statute at issue. Cf. O.C.G.A. § 16-12-100 with 636 F. Supp. at 830. Nevertheless, the Georgia Court of Appeals dismissed *Dost* as a case that merely, "interprets California law (sic), and thus is not controlling authority." (App. A at 10).

The *Dost* Court undertook to flesh out this Court's requirement of an independent examination. It did "not presume to create a comprehensive definition of either lewdness or lasciviousness." Instead it held that "the lascivious exhibition' determination must be made on a case-by-case basis" and identified six "general principles" it deemed useful as "guides

for analysis."[3] *Dost*, 636 F. Supp. at 832. *Dost* has been widely adopted. Of the numerous jurisdictions that have considered

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3. Because of the sexual innocence of children, that which constitutes a 'lascivious exhibition' of a child's genitals will be different from that of a 'lascivious or lewd exhibition' of an adult's genitals. . . . A child of very tender years, because of his innocence in matters sexual, would presumably be incapable of exuding sexual coyness. Sexual coyness is an expression outside the young child's range of experience.

Instead this Court feels that, in determining whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area" under § 2255(2)(E), the trier of fact should look to the following factors, among any others that may be relevant in the particular case:

1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) whether the child is fully or partially clothed, or nude;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Of course, a visual depiction need not involve all of these factors to be a 'lascivious exhibition of the genitals or pubic area'. The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.

*United States v. Dost*, 636 F. Supp. 828, 832 (S.D.Ca.) (footnotes omitted).

the *Dost* standards, Georgia is apparently the first to decline to follow them. See Adler, *The Perverse Law of Child Pornography*, 101 Colum. L.Rev. 209, 261, n.291 (2001) ("I have not found a single case in any jurisdiction in which a court mentions the *Dost* factors and declines to follow them.").

Having rejected *Dost* in favor of any-evidence review and having refused to construct its analysis on a constitutional foundation, the Georgia Court of Appeals founded its analysis on the specific language of the statues under which Craft was charged. It applied the any-evidence standard of review in three different ways: one way for the lewd-exhibition-of-the-genitals counts, another for the other exploitation counts, and a third for the molestation counts.

Applying the any-evidence standard to the lewd-exhibition-of-genitals counts, the Court of Appeals recognized that, even under that deferential standard of review, "lewd exhibition" had to be proven. It reversed a number of counts on the basis that, while the child's genitals were partially or fully visible, there was no evidence of lewd exhibition. The bulk of those reversed counts are for whole-body pictures of fully clothed children sitting on the floor. (App. A at 12a).

Those reversals notwithstanding, any-evidence review was excessively deferential. Many convictions were upheld notwithstanding that none of the pictures are sexual. For example, convictions for two photographs involving pictures of a little girl "shown nude and in the process of taking off her clothes" were upheld with a conclusory declaration that the evidence was sufficient. (App. A at 12a).

As to the counts charged under other prongs of the exploitation statute, the Court of Appeals applied the any-evidence standard of review in an even more deferential way. Because there is no lewd-exhibition provision in those other prongs of the statute, the Court of Appeals did not inquire whether the pictures were lewd. It did require that

the photographs portray what the state alleged they portray. (App. A at 12a, 13a-14a) (overturning convictions because photographs the state alleged to portray masturbation do not portray masturbation).

But any-evidence review of those other prongs of the exploitation statue required little else. As indicated above, the photographs charged under the defecation-or-urination prong of the exploitation statute do not remotely portray scatological eroticism. Nevertheless, the Court of Appeals upheld those convictions. (App. A at 14a, 15a). That prong does require that the portrayal be "for the sexual stimulation of the viewer." But the Court of Appeals construed that requirement to mean only that the state must prove "[i]ntent, which is a mental attitude, . . . commonly detectable only inferentially. . . ." (App A at 15a-16a). Intent, the Court of Appeals went on to hold, can be inferred from, "evidence which is exceedingly weak and unsatisfactory." (App. A at 17a). The Court of Appeals deemed the evidence of intent sufficient to authorize the fact finder to impute to Craft a "lustful disposition." (App. A at 18a, B at 28a).

As to the counts charged under the general molestation statute, any-evidence review was still more deferential. Again, the Court of Appeals applied any-evidence review to the fact finder's determination that Craft lusted in his heart. (App. A at 16a-17a). But, as to the content of the pictures, any-evidence review meant no review. The Court of Appeals held that the molestation statute's "indecent act" requirement (O.C.G.A. § 16-6-4) is satisfied by pictures of nude children in which the child's genitals are not visible — including pictures which the Court of Appeals acknowledged to be indistinguishable from the traditional image of a small child on a bearskin rug. (App. A at 16a-18a, B at 27a-28a).

Under the reasoning of the Court of Appeals, therefore, Georgia's exploitation statute, with its defined proscriptions, is

surplusage. Under the general molestation statute, there are no limits to the types of pictures that can be used to charge child pornography.

The Supreme Court of Georgia denied cross petitions for certiorari by a vote of four to three. (App. C at 29, D at 30a). Of course, denial of certiorari is not an endorsement of the opinion below. *Adair v. Traco Division*, 192 Ga. 59, 64-66, 14 S.E.2d 466 (1941). But the Court of Appeals of Georgia has statewide jurisdiction. O.C.G.A. § 15-3-1. Its decisions are binding on all courts in the state, except the state supreme court (Ga. Const. Art. VI, § V, ¶ III), and can be reversed by the Court of Appeals itself only en banc. O.C.G.A. § 15-3-1(d). Consequently, it is now the law in Georgia that, whenever a fact finder disapproves of a photograph of a child and also disapproves of the photographer, the photographer can be convicted of child molestation.

The Constitution of the United States and the decisions of this Court say otherwise.

## REASONS FOR GRANTING THE WRIT

### I. The writ should be granted because conviction on the basis of "weak and unsatisfactory" evidence of a lustful disposition is inconsistent with due process.

Even if the First Amendment were not implicated, sustaining convictions on the basis of "weak and unsatisfactory" evidence of a defendant's lustful disposition would be inconsistent with due process. In *Jackson v. Virginia*, 443 U.S. 307, 313 (1979), this Court held — as a "readily apparent" proposition — that Louisiana's "no evidence" standard, which is comparable to Georgia's any-evidence rule, "is simply inadequate to protect against misapplications of the constitutional [due process] standard of reasonable doubt." This Court went on to note that "a mere modicum" of evidence might be sufficient under such a standard. "But it could not

seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 313.

## II. The writ should be granted because the decision below conflicts with this Court's prior rulings that child pornography may not be so defined as to criminalize constitutionally protected speech.

The Georgia appellate courts have abdicated to fact finders their responsibility to construe Georgia's molestation and exploitation statutes in harmony with the First Amendment to the Constitution of the United States. Georgia law now recognizes no constraints on the type of speech that may be criminalized if there is "any evidence" (App. A at 11a), however "weak and unsatisfactory" (App. A at 17a), of "lustful disposition." (App. A at 18a).

But the First Amendment is implicated. In *New York v. Ferber*, the seminal child-pornography case, this Court held that there is no constitutional protection for speech that entails exploitation of children, but also held that child pornography may not be so defined as to criminalize protected speech. *New York v. Ferber*, 458 U.S. 747, 764, 773 (1982). *Ferber* holds,

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.

458 U.S. at 764.

Later this Court reaffirmed that, even as to children, "'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Osborne v. Ohio*, 495 U.S. 103, 127 (1990).

Rejecting the overbreadth argument before it, the *Ferber* Court wrote, "Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.'" 458 U.S. at 773. The Georgia courts have now given to the proscription on lewd exhibitions of the genitals a construction that is expansive indeed.

The same reasoning that precludes an expansive construction of "lewd exhibition of the genitals" also precludes expansive construction of other prongs of the exploitation statute. This Court has rejected the idea that a "distinction between body areas and specific body parts is constitutionally significant. The crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks." *Osborne v. Ohio*, 495 U.S. 103, 114, n.11 (1990).

## III. The writ should be granted because the decision below conflicts with this Court's prior rulings that require an independent examination of whether attacked material is constitutionally protected speech.

In 1974, this Court overturned "the Supreme Court of Georgia's apparent conclusion that the jury's verdict against appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film [*Carnal Knowledge*] was protected by the First and Fourteenth Amendments." *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974). In its petition to the Georgia Supreme Court, the prosecution reminded that court of *Jenkins*. Recalling *Jenkins*, the prosecution wrote that the Georgia Supreme Court had "fought an unsuccessful rear guard action against" the trend represented by "a series of court decisions, particularly United States

Supreme Court and federal appellate court holdings, [that] were increasingly favorable to explicit depictions and descriptions of sexuality."

In the present case, Craft has been afforded appellate review only pursuant to the highly-deferential any-evidence standard of review. The Georgia appellate courts have refused to review Craft's assertion that his photography was protected by the First and Fourteenth Amendments. The Georgia appellate courts have once again refused to provide the independent examination mandated by the constitution.

The requirement of an independent examination was recognized in *Ferber*. But there was "no argument that the films [at issue in *Ferber* did] not fall squarely within the category of activity [this Court has] defined as unprotected." *Ferber*, 458 U.S. at 774, n.28. At issue in *Ferber* were "films devoted almost exclusively to depicting young boys masturbating." 458 U.S. at 752. As to such films, this Court held, "no independent examination of the material [would be] necessary to assure . . . that the judgment here 'does not constitute a forbidden intrusion into the field of free expression.'" *Ferber*, 458 U.S. at 774, n.28, citing *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964).

Coincidentally, as noted in the margin above, there was testimony in the present case that Craft had created a videotape similar to the films at issue in *Ferber*. But no such tape — nor anything like such a tape — was found among the truckloads of material seized from Craft's home. The trial court accepted the testimony that such a tape existed and convicted Craft upon it. But he imposed no prison time for that offense. If such a tape had been in evidence, the trial court would undoubtedly have treated it at least as seriously as he treated the other videotapes and photographs upon which he convicted Craft. Undoubtedly he would have imposed an additional concurrent twenty-year sentence of imprisonment. Such a conviction and sentence would be unassailable and would effectively moot this appeal.

As it is, this case is about an effort by the state to greatly extend the outer boundaries of what speech may constitutionally be criminalized. An independent examination is therefore mandatory.

In a First Amendment case subsequent to *Ferber* — which was about defamation but included a discussion and reaffirmation of *Ferber* — this Court adopted the language of an earlier concurring and dissenting opinion by Justice Harlan. That opinion plainly and forcibly disapproves the hands-off approach taken here by the Court of Appeals and mandates an independent examination.

> Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppress[i]ble within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.
>
> **I do not think that reviewing courts can escape this responsibility** by saying that the trier of facts, be it a jury or a judge, has labeled the questioned matter as "obscene," for, if "obscenity" is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind.

*Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 506, n.25 (1984) quoting *Roth v. United States*, 354 U.S. 476,

497-498 (1957) (Harlan, J., concurring and dissenting) (emphasis added).

By holding that "weak and unsatisfactory evidence" of lascivious intent can make pornography of an otherwise innocuous photograph, the Court of Appeals sought to "escape this responsibility." The decision below sets out an unconstitutional rule of law and cannot stand.

## IV. The writ should be granted in order to resolve a conflict whether the guidelines set out in *United States v. Dost* are to be used to determine whether the attacked material is constitutionally protected speech.

Among the lower Courts applying *Ferber*, a uniform consensus had formed around the guidelines set out in *United States v. Dost*, 636 F. Supp. 828 (S.D.Cal. 1986). *E.g. United States v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994); *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999) (emphasizing that the *Dost* factors are "neither comprehensive nor necessarily applicable in every situation"); *United States v. Rubio*, 834 F.2d 442, 448 (5th Cir. 1987) (affirming use of factors without specifically citing *Dost*); *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999) ("we find helpful the six criteria suggested" in *Dost*); *United States v. Wolf*, 890 F.2d 241, 244-46 (10th Cir. 1989) ("We agree with the Ninth Circuit's interpretation of the statutory language [in *Dost*]"); *Nebraska v. Saulsbury*, 498 N.W.2d 338, 344 (Neb. 1993); see also Adler, *The Perverse Law of Child Pornography*, 101 Colum. L.Rev. 209, 261, n.291 (2001) ("I have not found a single case in any jurisdiction in which a court mentions the *Dost* factors and declines to follow them.").

By rejecting *Dost*, the decision below has created a conflict. Rejecting *Dost* cleared the way for an unwarranted expansion of *Ferber* which threatens valuable constitutionally protected speech. It is now timely and appropriate for this Court to adopt the *Dost* standards.

**V. The writ should be granted because the decision below conflicts with this Court's prior rulings that the states cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.**

This Court has repeatedly held, beginning with another reversal of the Georgia Supreme Court, that Congress and the states, "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566 (1969); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990); *Ashcroft v. Free Speech Coalition*, __ U.S. __, 122 S. Ct. 1389, 1403 (2002).

In *Ashcroft*, this Court recently reaffirmed that,

> First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.
>
> To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.

*Ashcroft v. Free Speech Coalition*, __ U.S. __, 122 S. Ct. 1389, 1403 (2002).

Here, the Court of Appeals has held that a defendant's "lustful disposition" can transform an innocuous photograph into child pornography. (App. B at 27a-28a). The holding of the Court of Appeals "seeks to control thought."

## VI. The writ should be granted in order to resolve a conflict whether lewdness is objective or subjective.

A corollary of the proposition that the criminal law may not seek to control though is that lewdness is objective. *Dost* does not address whether lewdness is objective or subjective — that is, whether the state may — as it argued at trial — use evidence extrinsic to the images themselves to turn pictures of "children in their innocent play" into pornography.

Most courts that have considered the issue have adopted an objective standard. *United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999); *People v. Lamborn*, 185 Ill.2d 585, 590, 708 N.E.2d 350, 354 (1999); *State v. Gates*, 182 Ariz. 459, 463, 897 P.2d 1345, 1349 (1994) ("The defendant is the one who sets up the exhibition, and the lewdness of that exhibition is measured, in part, by the defendant's intent. But defendant's intent cannot create a 'lewd exhibition' out of otherwise innocent activity by children."); *United States v. Villard*, 700 F. Supp. 808 (D.N.J. 1988).

Georgia has placed itself at the forefront of a minority that embraces a subjective standard. *United States v. Moore*, 215 F.3d 681, 687 (7th Cir. 2000); *United States v. Knox*, 32 F.3d 733, 738 (3d Cir. 1994). Because *Knox* and *Moore* involved material marketed to pedophiles, those cases do not go as far as Georgia has gone.

The correct rule is an objective a standard, limiting the analysis to the four corners of the images at issue. An objective approach is consistent with independent review.

There are several problems with a subjective approach. Such an approach calls upon courts to see the world from a pedophile's perspective. Unfortunately, pedophiles can find any picture of children erotic. See Adler, *Inverting the First Amendment*, 149 U.Pa.L.Rev. 921, 945, n.108 (2001).

As detailed below the subjective approach has led some officials to embrace an ill-advised expansion of the concept of child pornography, which has come to represent a real threat to law abiding parents. Adler, *supra*, at 964-965, notes 191-196; Marion Rubin, Naked Truths 53-59 (2002) (describing convictions and plea bargains as well as the drastic consequences even of acquitals in these cases.)

Moreover, a subjective standard is circular. A pedophile is someone who enjoys child pornography; child pornography is material enjoyed by pedophiles.

An objective standard rests child pornography law upon its foundation: protecting children from the abuse inherent in creating child pornography. In the present illustrates how far from that foundation a subjective approach can take child pornography law. *Ferber* involved "films devoted almost exclusively to depicting young boys masturbating." 458 U.S. at 752. The pictures at issue in *Osborn* were worse. 495 U.S. at 107, note 1. The harm children suffered in the creation of those images and from their continued circulation is self-evident and serious. Those harms are the reason *Ferber* withdrew first-amendment protection from child pornography. 458 U.S. at 756-763. The further the law strays from those indisputable harms, the closer it comes to policing "a person's private thoughts," which it may not do. *Stanley v. Georgia*, 394 U.S. 557, 566 (1969); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990); *Ashcroft v. Free Speech Coalition*, __ U.S. __, 122 S. Ct. 1389, 1403 (2002).

## VII. The writ should be granted because of the powerful chilling effect of the decision below.

Child pornography "law has come to threaten a vast array of innocent and valuable depictions of children." Adler, *Inverting the First Amendment*, 149 U. Pa. L.Rev. 921, 927 (2001). The present case is one of a number of recent child-pornography prosecutions for photographs that portray nudity without more, many ending in plea bargains or convictions. Adler *supra*, at

964-965, notes 191-196; Marion Rubin, Naked Truths 53-59 (2002) The popular press now reflects a growing recognition that parents cannot safely take nude photos of their children. E.g. ABC News.com, Shutterbugs Beware (Aug. 13, 2001) <http://abcnews.go.com/sections/Downtown/2020/Downtown_010813_photolabs.html>. The ABC News article closes with a warning from a former sex-crimes prosecutor. "[P]arents should not 'take pictures of kids under 18, who you know aren't fully clothed . . . If you do take pictures, you really have to be prepared to defend yourself in any courtroom in the country in front of 12 jurors.'" The decision below strongly reinforces that warning.

That chilling effect is exacerbated by the insensitivity of the Court of Appeals to the practicalities of photography. Craft's prolificity was an important element of the case against him. The Court of Appeals held that lascivious intent can be inferred from the "hundreds of photographs of nude or partially nude children or their genitalia [which] were admitted into evidence." (App. B. at 28a). As to the tens of thousands of admittedly innocuous photographs from which those hundreds were painstakingly selected, the Court of Appeals held, "The court is not constrained to view as a whole evidence pertaining to sexual portrayals of children." (App. A at 24a).

This analysis confuses the prosecutor's preoccupation with the defendant's. An art gallery at which each nude is surrounced by a hundred pictures of other types would be a very different place from a gallery displaying only hundreds of nudes. The former is what prosecutors found, the latter is what they presented at trial. In fact, only two of the charges were for pictures Craft selected for display — and those convictions were reversed. The state built its case out of Craft's discards.

The analysis of the Court of Appeals also overlooks the fact that, like most skills, photography can be mastered only with extensive practice. See Marion Rubin, Naked Truths 34 (2002) (describing a course that requires a commitment to shoot

a minimum of a roll (36 photos) every day for ten weeks). Moreover, this analysis erroneously assumes that every photograph is a reliable indicator of the photographer's intent. Photographers often "shoot a lot of film (the least expensive part of photography) in the hope of catching that one really special moment. . . ." Marion Rubin, Naked Truths 37 (2002). The teaching of the decision below is that, whenever a child may appear in the frame, photographers must pause before each snap of the shutter to assure that nothing will be captured that cannot be easily explained to a skeptical police officer.

## CONCLUSION

The present case has aroused considerable passion. When a county magistrate allowed Craft to make bond, the local newspaper published an editorial condemning that decision and attacking the magistrate. Editorial, *Allen's Turnaround*, Augusta Chron. April 21, 1998 *available at* <http://www.augustachronicle.com/stories/042198/opi_046-7932.shtml> Craft was soon back in jail. In his opening statement, the District Attorney called Craft, "one of the most dangerous child molesters . . . ever seen in the courts of this state of Georgia or in this nation." In its brief to the Court of Appeals, the state was moved to write about "its feelings." Even as it reversed most of Craft's convictions, the Court of Appeals was moved to declare Craft's conduct "despicable and perverted." (App. A at 12a).

The righteous passion of those guardians of the public good was not shared by the individuals who are the supposed victims. At sentencing parents of children Dr. Craft has been convicted of molesting and exploiting — speaking for themselves and for the children, whose live testimony the trial court discouraged — asked that Dr. Craft be released immediately.

Such passion is often aroused by child-pornography cases. See Adler, *The Perverse Law of Child Pornography*, 101 Colum. L.Rev. 209, 240, n.175 (2001) (describing the "political

firestorm" prompted by *United States v Knox*, 32 F.3d 733 (3d Cir. 1994)). Such passion creates pressure and temptation to disregard the Constitution of the United States and the decisions of this Court.

Accordingly, Dr. Robert Bruce Craft respectfully requests that his petition for the writ of certiorari be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE COURT OF APPEALS OF THE STATE OF GEORGIA DATED JANUARY 31, 2002

**COURT OF APPEALS OF THE STATE OF GEORGIA**

ATLANTA, JAN 31, 2002

*The Court of Appeals hereby passes the following order:*

**A01A0880, A01A0881. CRAFT v. THE STATE**

Due to clerical error, it is hereby ordered that the opinion in the above-styled case attached hereto be substituted for the opinion previously issued on November 9, 2001.

*Appendix A*

**FIRST DIVISION**
**BLACKBURN, C. J.,**
**POPE, P. J., MIKELL, J.**

**November 9, 2001**

**IN THE COURT OF APPEALS OF GEORGIA**

A01A0880, A01A0881. CRAFT v. THE STATE

MIKELL, Judge.

After a bench trial, Dr. Robert Bruce Craft was convicted of 102 counts of sexual exploitation of a minor[1] and 15 counts of child molestation.[2] On appeal, Craft urges that we reverse either his convictions, or in the alternative, the denial of his amended motion for a new trial, arguing the following: (1) the verdicts on counts one through 45 of the Richmond County indictment and counts one through 70 of the Columbia County indictment are contrary to the evidence; (2) the photographic and videotaped evidence was not properly authenticated and its admission violated his constitutional rights; (3) the verdict is contrary to the evidence because the state failed to prove that the testimony or photographs of F.R., a minor child, violated OCGA § 16-6-4 in counts 34, 35, 37 through 40, 42, and 71 through 73 of the Columbia County indictment or that the photographs of D.S.,

1. Seventy-five of the 102 counts pertained to violations of OCGA § 16-12-100 (b) (5), 24 to violations of OCGA § 16-12-100 (b) (7), and 3 to violations of OCGA § 16-12-100 (b) (8).

2. OCGA § 16-6-4.

a minor child, violated OCGA § 16-6-4 in counts 14 through 18 of the Columbia County indictment; (4) the trial court erred in denying his motion to suppress all of the evidence; (5) the trial court erred when it denied his motion to examine and test evidence; and (6) the trial court failed to make the required findings of fact in regard to its denial of his motion for an appeal bond. For the reasons stated below, we affirm in part and reverse in part.

"On appeal the evidence must be viewed in the light most favorable to support the verdict, and appellant no longer enjoys a presumption of innocence; moreover, an appellate court determines evidence sufficiency and does not weigh the evidence or determine witness credibility."[3]

So viewed, the evidence shows that in June of 1996, Federal Bureau of Investigation Special Agent Keith Owens was contacted by the FBI's Charlotte division to determine whether Craft, who had had photographs developed at Fort Gordon, was a real person. Owens testified that he was given copies of 37 photos of a small boy lying on a sofa, most of which showed the boy cutting or stabbing at his erect penis with what appeared to be a knife. There was an adult in one of the photos with the small child. Owens learned that Craft, a child psychologist, was the adult in the photograph.

On September 20, 1996, Owens visited Craft's coworker, Dr. John McCormack, and showed him several of the pictures. When asked if there could be a reason that such photos had been taken, McCormack said that he did not know

3. (Citation omitted.) *Jones v. State*, 234 Ga. App. 571 (1) (507 SE2d 804) (1998).

of any, but hoped that there was an explanation. With McCormack's assistance, Owens decided when to approach Craft at his office to interview him. Owens met with Craft in Craft's office in Richmond County on October 1, 1996, and informed Craft that he needed to talk with him about some possible violations of laws governing sexual abuse. Owens also told Craft that he was not under arrest, would not be arrested at the conclusion of the interview regardless of what he said, and that he could ask Owens to leave at any time.

Owens showed Craft one of the pictures he had received from Charlotte. Craft identified the minor child in the photograph as C.G. and admitted that he had taken the photo in his office. Owens noticed a distinctive sofa and pillow in Craft's office that had appeared in most of the 37 photographs.[4] When Owens showed Craft the remaining pictures of C.G., Craft explained that "he took the pictures because he was amused and he was trying to understand why C.G. was doing what he was doing." Craft said that he had become very involved with photography over the previous five years, always had his camera nearby, and regularly took pictures of his child patients. Owens testified:

> He said that he had never taken nude or sexual pictures of other children except when occasionally

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4. All but two of these exhibits are photographs of C.G. at various angles exposing his erect penis and a toy knife. In the two where his penis is not clearly exposed, he is jabbing at his pubic area with the toy knife. Exhibits 1 through 1 W were incorporated by reference into counts One through 24 of the Richmond County indictment.

a child would be hamming, as he called it, during a picture and pull his pants down. He denied ever having these children pose for the photographs and he denied that he'd ever touched them sexually or had them touch him sexually. He said that these were the most explicit photographs he'd ever taken of children. He advised that the original slides of these photographs of C.G. playing with the knife were at his home and any other photographs that he'd taken of children exposing their genitals and buttocks were at his home. He said he didn't take these pictures for any training purposes or for any professional study. He said he didn't want these photos to get out and they never did, and this was in reaction to — I asked him about if he'd put them on the Internet or shared them with friends, that type of thing. He said he — they never got out. He never wanted them to get out and they never did. He described the spontaneous photographs of children exposing themselves as cute and stated he found it intriguing what these children do. . . He said he never did get any sexual gratification from these photographs. He said that he had never masturbated while looking at these pictures. I asked him why would he take these pictures of other people's children with the genitals exposed and not share those with the family of these other children. He became a little bit defensive and stated two or three times that he could probably make a clinical argument for taking the pictures. He said — he admitted that a part of him said

> maybe he shouldn't do it and he knew they were inappropriate. He also mentioned that his colleagues would never understand. In the case of C.G., Dr. Craft described his interest in taking the pictures as morbid fascination with what C.G. was doing with the knife.

After the interview, Owens discussed the case with an Assistant United States Attorney, and they decided to investigate further. Consequently, they obtained search warrants over the weekend so that Craft would not have time to destroy the pictures. All of the warrants instructed the agents to search for:

> Any and all photographs or visual depictions of any kind, including computer generated matter of minors engaged in sexually explicit conduct; books; magazines; periodicals; films; videotapes; or other matter which contained any visual depiction of a minor engaged in sexually explicit conduct; receipts; canceled checks; money orders; and order forms which are evident of interstate transportation or mailings of film, books, magazines, periodical [sic], videotapes, or other matter which contains any visual depiction of a minor engaged in sexually explicit conduct; any records of treatment pertaining to C.G.; any undeveloped film which may contain visual depictions of a minor engaged in sexually explicit conduct; the toy knife depicted in photographs of C.G. reflected in attachment B; any diaries or writings describing any sexually explicit conduct by or with a minor.

*Appendix A*

Owens executed search warrants on Craft's two offices, both in Richmond County, on October 4, 1996. No evidence was taken from his office at the Veteran's Administration hospital. At the office where Owens interviewed Craft, the agents seized message notes pertaining to C.G. but could not locate C.G.'s file. They also seized the toy knife and took photographs of that office.

Special Agent Harold Harrison, who executed the search warrant on Craft's residence in Columbia County on that same day, testified that his search team confiscated 27 boxes of evidence, the bulk of which was taken from two rooms, a computer room and a room containing a sofa and a projection screen. The boxes were taken to a secure room at the FBI office in Augusta and were turned over to Owens the next morning. There were approximately 37,000 photographs and slides in the boxes. Owens looked at every photograph and slide. Agent Harrison informed Owens that the team saw, but did not seize, several videotapes from Craft's house because they had seized so many photographs.

On October 21, Owens interviewed Jamie and Judy Rumbaugh, whose six children were patients of Craft's and with whom C.G. lived while initially under Craft's care. Owens showed the Rumbaughs approximately 350 photographs and slides of their children nude or partially nude. The Rumbaughs told Owens that Craft often had both his still camera and video camera at his office. Consequently, Owens added the information about the video camera to the original affidavit for the search warrant and obtained another search warrant to seize the videotapes.

*Appendix A*

The second warrant authorized a search for "any and all homemade videotapes which may reasonably contain visual depictions of minors engaging in sexually explicit conduct; [and] any and all commercially made videotapes which contain visual depictions of minors engaged in sexually explicit conduct." The videotapes were seized from Craft's home on October 24, 1996.

After cataloguing the evidence he thought was incriminating, Owens obtained a subpoena to find out the identities of some of the children in the photographs. Pursuant thereto, Craft gave Owens their names, addresses and telephone numbers. Owens contacted the Department of Family and Children Services (the "Department") and learned that it had referred eighteen children to Craft. When he asked the Department for assistance with interviewing the children, he was referred to Investigator John Durden from the Georgia Bureau of Investigation.

Owens showed the pictures to Durden on March 5, 1998. After Durden discussed the case with the district attorney and a decision was made to prosecute the case at the state level, the GBI took possession of the photographs. Durden obtained arrest warrants from both Columbia and Richmond counties and search warrants for Craft's office and residence. He arrested Craft and searched Craft's residence on March 9, 1998, while another officer searched Craft's office.

Craft was indicted in Richmond County on 45 counts of sexual exploitation of a minor in violation of OCGA § 16-12-100 (b) (5) and one count of child molestation against

F.R. He was convicted of each count of sexual exploitation and the state withdrew the molestation charge. In Columbia County, Craft was indicted on 31 counts of sexual exploitation of a minor, in violation of OCGA § 16-12-100 (b) (5), 24 counts of sexual exploitation of a minor, in violation of OCGA § 16-12-100 (b) (7), three counts of sexual exploitation of a minor, in violation of OCGA § 16-12-100 (b) (8), and 15 counts of child molestation. He was convicted of each count, with the exception of one OCGA § 16-12-100 (b) (5) count. Craft agreed to waive the issue of venue with regard to the Columbia County indictment and to try both cases in Richmond County.

1. In his first enumeration of error, Craft argues that the verdict is contrary to the evidence because the state did not prove that the photographs attached as exhibits to counts one through 45 of the Richmond County indictment and as exhibits to counts one through 70 of the Columbia County indictment violated OCGA §§ 16-12-100 or 16-6-4. When the sufficiency of the evidence is challenged, we use the test established in *Jackson v. Virginia*,[5] to determine whether the evidence was sufficient for any rational trier of fact to find the defendant guilty of the crimes charged.

The indictments alleged violations of several sections of OCGA § 16-12-100, which provide, in relevant part:

> (b) (5) It is unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to

5. 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

> sell or distribute any visual medium which depicts a minor engaged in any sexually explicit conduct; (b) (7) It is unlawful for any person knowingly to bring or cause to be brought into this state any material which depicts a minor engaged in any sexually explicit conduct; (b) (8) It is unlawful for any person knowingly to possess or control any material which depicts a minor engaged in any sexually explicit conduct.

OCGA § 16-12-100 (a) (4) defines "sexually explicit conduct," in relevant part, as actual or simulated "C) masturbation; (D) lewd exhibition of the genitals or pubic area of any person; (H) defecation or urination for the purpose of sexual stimulation of the viewer."

Craft first argues that the state failed to prove that the photographs depicted a minor engaged in the "lewd exhibition of genitals." Because "lewd exhibition of genitals" has not been defined in Georgia, Craft contends that the trial court should have examined the six factors set forth in *U.S. v. Dost*[6] to determine whether the photographs were lewd.[7] We disagree. *Dost* interprets California law, and thus

6. 636 F. Supp. 828 (S.D.Cal. 1986).

7. The *Dost* factors are: 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. Id. at 832.

is not controlling authority. Though the term has not been defined in Georgia, in *Unden v. State*,[8] we held, "[u]nless an act is found not to be lewd as a matter of law, whether such act is lewd under the attendant circumstances usually 'is best left to a jury for determination.'"[9] In this case, there was a bench trial. When the trial court sits as the trier of fact, "its findings are analogous to a jury verdict and will not be disturbed if there is any evidence to support them."[10]

a. Richmond County indictment

The Richmond County indictment charges 45 violations of OCGA § 16-12-100 (b) (5). In each count, with the exception of 23 and 24, Craft is charged specifically with creating "a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals." We affirm counts one through 22, 30 through 35, 40 and 41. However, we reverse the convictions on counts 23 through 29, 36 through 39, and 42 through 45 because the evidence is insufficient to support these convictions.

The exhibits attached to counts one through 22 were among the 37 photographs that Owens initially showed Craft

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8. 218 Ga. App. 463 (462 SE2d 408) (1995) (appellant asserted as error the trial court's failure to charge the jury on the *Dost* factors and we stated that we were not deciding "whether a *Dost* factor charge is either appropriate or indispensable in sexual exploitation cases arising from an averred violation of Georgia law"). Id. at 466 (5).

9. Id. at 464 (2).

10. *Tuner v. State*, 233 Ga. App. 413 (504 SE2d 229) (1998).

during their interview. As Craft informed Owens, these photographs depicted C.G. as he played with his penis or with his penis and a rubber knife. The exhibits attached to counts 30 through 35 display a different minor, who has lowered his pants to show his penis. In the exhibits attached to counts 40 and 41, a minor female child is shown nude and in the process of taking off her clothes. Owens testified that the couch and a pillow in the photographs were in Craft's office when he interviewed him. We find that there is evidence sufficient to support Craft's convictions on these counts.

In Counts 23 and 24, the indictment charges Craft with creating a photograph depicting a minor child engaged in masturbation with a toy knife. In both photographs, the child's penis is not shown. In the first picture, he is pointing the knife at his penis through his shorts and in the other photo, he appears to be cutting at his penis with the knife. We find the evidence insufficient to support the convictions on these counts as there is no evidence that the child was simulating or actually engaging in masturbation.

The exhibits attached to counts 25 through 29, 36 through 39, and 42 through 45 are photographs of minor children who are wearing short pants and sitting down with their legs open. Due to the angle of the photograph, each child's genitals are partially or completely observable. However, the child is either innocently playing with something or just sitting, not engaging in the lewd exhibition of his or her genitals. The photographs evidence conduct by the defendant that was despicable and perverted; i.e., surreptitiously photographing

the genitals of children. However, the conduct is not within the precise language of the statute and the evidence is hence insufficient on those counts.

b. Columbia County indictment

Craft was convicted of violating OCGA § 16-12-100 (b) (5) in counts 1 through 13, 19 through 33, 41, and 67, OCGA § 16-12-100 (b) (7), in counts 43 through 63 and 68 through 70, OCGA § 16-12-100 (b) (8), in counts 64 through 66, and OCGA § 16-6-4 in counts 14 through 18, 34, 35, 37 through 40, and 42. We affirm Craft's convictions on counts 33, 44 through 46, 53, and 68, 14 through 18, 34, 35, 37 through 40, and 42. We reverse his convictions on counts 1 through 13, 19 through 32, 41, and 67; 43, 47 through 52, 54 through 63, 69, and 70; and 64 through 66.

In all but two of the counts charging violations of OCGA § 16-12-100 (b) (5), Craft was indicted for creating a visual medium that depicted a minor child engaged in sexually explicit conduct, specifically "lewd exhibition of genitals." We reverse Craft's convictions on counts 1 through 12, 19 through 32, 41 and 67, finding that as a matter of law, the photographs and videotape (Count 67) did not depict minors engaged in any sexually explicit conduct. Count 13 charges that Craft created a photograph of a child masturbating. The photograph depicts a minor child sitting with his legs open with his hands on either side of his underwear. The evidence is insufficient to support this conviction.

We affirm the conviction as to Count 33. In the exhibit attached to Count 33, F.R., the only child to testify at the trial, is sitting on a toilet. When asked what he was doing in

the picture, F.R. said that he was using the rest room. As utilized in OCGA § 16-12-100, sexually explicit conduct includes "defecation or urination for the purpose of sexual stimulation of the viewer."[11] Viewing the evidence in the light most favorable to the trial court's verdict, any rational trier of fact could have found the evidence sufficient to support this conviction.[12]

As stated earlier, OCGA § 16-12-100 (b) (7) provides that "it is unlawful for any person knowingly to bring or cause to be brought into this state any material which depicts a minor engaged in any sexually explicit conduct." The sexually explicit conduct referenced in counts 43, 47 through 63, and 68 through 70 is "lewd exhibition of genitals." The exhibits attached to counts 43 and 54 depict sleeping minor children, whose genitals are partially exposed. We reverse Craft's conviction on these counts. The exhibits attached to counts 47 through 52 and 55 through 63 depict children playing outside in a woody area in various stages of nudity. Owens testified that these photographs were marked "Smokey Mountains." Because the photographs display children before or after swimming, there is no evidence to support the trial court's finding that their nudity constituted a lewd exhibition of their genitals. Likewise, there is no evidence to support the trial court's finding that the photographs referenced in counts 69 and 70 of a partially nude minor child as he climbed a wall depicted a lewd exhibition of the genitals. Thus, Craft's convictions for these counts are also reversed.

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11. OCGA § 16-12-100 (a) (4) (H).

12. See *Short v. State*, 234 Ga. App. 633, 634 (1) (507 SE2d 514) (1998).

As to Count 53, however, the evidence shows a minor child with his underpants pulled down, pointing to his penis. A rational trier of fact could infer that the child was lewdly exhibiting his genitals, and hence the evidence was sufficient to support that count.

The exhibits serving as the basis for counts 44 through 46 depict minor boys who are urinating from a back and side angle. In the videotape that served as the basis for Count 68, the minor child is urinating outside and once he notices the camera, continues to urinate and smiles directly into the camera. Urinating is defined as a type of sexually explicit conduct. "Intent, which is a mental attitude, is commonly detectible only inferentially, and the law accommodates this."[13] Thus, the trier of fact could have inferred that Craft created these photographs for his own sexual gratification. Accordingly, we find the evidence sufficient to sustain a guilty verdict on these counts.

In Counts 64 through 66, Craft was charged with violations of OCGA § 16-12-100 (b) (8), which makes it unlawful to knowingly possess or control material depicting a minor engaged in any sexually explicit conduct. Investigator John Durden testified that he seized the photographs attached to counts 64 through 66 during his search of the Craft residence. These photographs depict a young boy who is sitting with his legs open and wearing swimming trunks. His genitals are partially exposed, apparently by accident, through the leg of his shorts. A rational trier of fact could

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13. (Citations omitted.) *Ney v. State*, 227 Ga. App. 496, 497 (1) (489 SE2d 509) (1997).

not infer that the photographs depict a minor intentionally engaged in the lewd exhibition of his genitals. Therefore, we reverse Craft's convictions on these counts.

In Counts 14 through 18, 34, 35, 37 through 40, and 42, Craft is charged with violating OCGA § 16-6-4, which provides, "A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person."[14] In Counts 14 through 18, 34, 35, 37 through 40, the indecent or immoral act with which Craft is charged is photographing children while they were nude, for the purpose of satisfying his sexual desires. In Count 42, Craft is charged with committing the indecent act of photographing a child while the child was pulling down his pants and exposing and slapping his buttocks for the camera, for the purpose of satisfying Craft's sexual desires.

As stated earlier, intent can be inferred.[15]

> A reviewing court will not disturb a factual determination by the jury on intent unless it is contrary to the evidence and clearly erroneous. The intent with which an act is done is peculiarly a question of fact for determination by the jury and even when a finding that the accused had the

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14. Counts 71 through 73 of the Columbia County indictment also allege violations of OCGA § 16-6-4, but Craft's first enumeration of error does not contest those counts.

15. *Ney*, supra.

> intent to commit the crime charged is supported by evidence which is exceedingly weak and unsatisfactory the verdict will not be set aside on that ground.[16]

Also, in child molestation cases, evidence of other similar offenses against children is admissible to show the lustful disposition of the defendant.[17] In this case, hundreds of photographs of nude or partially nude children or their genitalia were admitted into evidence. From this evidence, the trier of fact could infer that Craft took the photographs for the purpose of satisfying his sexual desires. Thus, we affirm the convictions on these counts.

2. In his second enumeration of error, Craft argues that the trial court erred by admitting all of the photograph and videotape evidence because it was not properly authenticated under OCGA § 24-4-48. We disagree.

"The admission of evidence lies within the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion."[18] OCGA § 24-4-48, which addresses the admissibility of photographs and videotapes, provides, in relevant part, "For purposes of this Code section, 'unavailability of a witness' includes situations in which the authenticating witness is exempted by ruling of the court on

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16. (Citations omitted.) *Ney*, supra at 498 (1).

17. *Baker v. State*, 241 Ga. App. 666, 669 (2) (527 SE2d 266) (1999).

18. (Citation omitted.) *Williams v. State*, 272 Ga. 828, 829 (3) (537 SE2d 39) (2000).

the ground of privilege from testifying concerning the subject matter of the authentication."[19] Thus, under OCGA § 24-4-48, Craft is deemed unavailable as an authenticating witness because he cannot be compelled to testify due to his constitutional right against self-incrimination. However, the statute also provides that even though the authenticating witness is unavailable, subject to any other valid objection, photographs and videotapes are admissible when the court determines, based on competent evidence presented to it, that the items tend to show reliably the fact or facts for which they are offered.[20]

Through Owen's, Durden's, and Harrison's testimony, the state introduced hundreds of exhibits. In each instance, the officers testified that they seized the evidence from one of Craft's offices or his home, and were able to verify that the exhibits depicted Craft's office or home. Moreover, Craft admitted to Owens that he regularly took pictures of his child patients.

As the trier of fact, the trial judge is allowed to infer other related or connected facts from the direct evidence that it finds are reasonable and justified in the light of its experience.[21] Accordingly, we find that the trial court's decision to admit the evidence based upon its inference from

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19. OCGA § 24-4-48 (a) (1).

20. OCGA § 24-4-48 (b).

21. See generally *McGarity v. State*, 212 Ga. App. 17, 20 (3) (440 SE2d 695) (1994).

the officers' testimony that Craft took the photographs and videotapes was not an abuse of its discretion.

3. In his third enumeration of error, Craft argues that the verdict is contrary to the evidence because the testimony and photographs of F.R. are insufficient to prove that Craft violated OCGA § 16-6-4 in counts 34, 35, 37 through 40, 42, and 71 through 73 of the Columbia County indictment and that the photographs of D. S. are insufficient to prove that Craft violated OCGA § 16-6-4 in counts 14 through 18 of the Columbia County indictment. As we have affirmed counts 14 through 18, 34, 35, 37 through 40 and 42 in Division 1 of this opinion, we need not address these counts again here. As to counts 71 through 73, we affirm.

In Count 71, Craft is charged with knowingly committing the indecent act of showing to F.R. a videotape portraying men and women engaged in sexual activity for the purpose of arousing Craft's or F.R.'s sexual desires. F.R. testified that he and Craft regularly watched videos at Craft's house and that on one occasion, they watched a video of adults engaging in sexual activity. As discussed earlier in Division 1 (b), whether Craft had the requisite intent is a question of fact for jury determination, and the trier of fact's finding will not be set aside unless it is clearly erroneous.[22] The evidence was sufficient to support the trial judge's finding that on count 71, Craft was guilty of violating OCGA § 16-6-4.

Craft is charged with fondling F.R.'s penis while bathing F.R. in the shower in Count 72 of the Columbia County

22. *Ney*, supra at 498 (1).

indictment. F.R. testified that Craft was always with him in the bathroom when he took baths. Craft would wash F.R. with his hands, instead of a washcloth. When F.R. was asked what parts of his body Craft would wash, F.R. replied, "mainly my penis and my buttocks and probably my back." Any rational trier of fact could have found the evidence sufficient to support Craft's conviction on count 72.

In Count 73, Craft is charged with committing the indecent act of asking F.R. to masturbate for him while in Craft's home. F.R. testified that Craft videotaped or took pictures of him while F.R. showed him what he did to masturbate. When cross-examined about whether Craft asked him to masturbate, F.R. testified that he was sure that Craft asked to watch F.R. masturbate after F.R. described how he did it. Accordingly, the evidence was sufficient to convict Craft on count 73.

4. Next, Craft enumerates as error the trial court's denial of his motion to suppress all of the videotaped, photographic, and other evidence, arguing that all three searches of his home and both searches of his offices were not justified by probable cause. On appeal from a trial court's ruling on a motion to suppress, if "the evidence is uncontroverted and no question regarding the credibility of witnesses is presented, the trial court's application of the law to undisputed facts is subject to de novo review."[23]

Craft argues, citing no authority, that the first search warrants were not supported by probable cause because

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23. (Citation omitted.) *State v. Mallard*, 246 Ga. App. 357 (541 SE2d 46) (2000).

Owens should have done further independent investigation before seeking the warrants. Owens initially applied for search warrants to search Craft's two offices and his home on October 4, 1996. In his application for the warrants, Owens explained how he first came into possession of the 37 photographs. He also averred that Craft admitted that he had taken those photographs as well as photographs of other children exposing their genitals. Further, Craft stated that he kept the photographs and slides of the children at his home and that he had documented at least one child's behavior in his treatment files. Owens stated that he believed that Craft kept photographs of children at his home and two offices. Owens attached pictures to the affidavit and listed the items to be seized during the search. The magistrate issued the warrants and thousands of photographs and slides were seized.

"A search warrant must be supported by probable cause, or reasonable grounds, to believe that evidence of a crime will be found in a particular place."[24] Our duty in reviewing the magistrate's decision to issue a search warrant is to determine if the magistrate had a substantial basis for concluding that probable cause existed and to give substantial deference to the magistrate's finding."[25] Here, the magistrate had a substantial basis for concluding that probable cause existed. Accordingly, the trial court's denial of Craft's motion to suppress the evidence gathered as a result of the first searches was proper.

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24. (Citation omitted.) *State v. Staley*, 249 Ga. App. 207, 209 (548 SE2d 26) (2001).

25. *State v. Henderson*, 271 Ga. 264, 269 (4) (517 SE2d 61) (1999).

*Appendix A*

On October 23, 1996, Owens sought a second warrant to search Craft's home for all home-made or commercially made videotapes depicting minors engaged in sexually explicit conduct. The supporting affidavit recited the same facts as the previous affidavit. In addition, it stated that Owens interviewed the parents of minor children who appeared nude or partially nude in several of the photographs and/or slides that had been seized and learned from them that Craft had also made videotapes of their children on many occasions. Craft argues that because the videotapes could have been seized pursuant to the first search warrant, there was no new probable cause to justify a second search. We disagree and find that the additional information provided in the supporting affidavit for the second search warrant provided a substantial basis for the magistrate to conclude that probable cause existed.

Finally, Craft contends that the third search of his home and second search of his office, both of which occurred on March 9, 1998, were not justified by probable cause because the evidence relied upon to obtain warrants for those searches was stale. In order to determine if the information relied upon in obtaining a search warrant is stale, we must "view the totality of the circumstances for indications of the existence of reasonable probability that the conditions referred to in the sworn testimony would continue to exist at the time of the issuance of the search warrant."[26]

GBI Agent Durden provided the supporting affidavits for the searches in question. In his affidavits, Durden averred

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26. (Citation omitted.) *Carruthers v. State*, 272 Ga. 306, 313 (5) (528 SE2d 217) (2000).

that on March 5, 1998, Owens showed him 500 to 700 pictures and told him that Craft admitted to taking photographs of children at his office, residence, and on camping trips. Owens also told him that one of Craft's neighbors saw him photographing a neighborhood child after the search warrants on his residence had been executed. For this reason, Owens told Durden that he believed that Craft continued to photograph children in his office in a sexually explicit manner and that Craft continued to treat some of the children depicted in the photographs and videotapes that had already been seized. Based on his training and experience as a child abuse specialist and on his interviews of child molesters and pedophiles, Durden averred that pedophiles and other individuals who prey upon children for their own sexual gratification rarely destroy the material that they collect. Further, Durden believed that items seized during a search would help the investigators to determine Craft's previous and current victims. After reviewing the totality of the circumstances, we find that the magistrate had sufficient evidence to conclude that there was a reasonable probability that the items to be seized remained in existence.

5. In his fifth enumeration of error, Craft argues that the trial court's denial of his motion to examine and test evidence violated his Fifth, Sixth, and Fourteenth Amendment rights as well as analogous provisions of the Georgia Constitution. We disagree. Citing no authority in support of his argument, Craft contends that his inability to review all of the photographs with his counsel prevented him from presenting a defense. Consequently, he maintains that the trial court only saw a very small number of the seized photographs and videotapes.

"Our appellate courts have repeatedly affirmed that a trial court is vested with latitude to handle within its sound discretion pre-trial matters . . . [such as] motions for discovery."[27] Craft was represented by counsel in this matter, whose effectiveness he has not challenged, and who were authorized to act on his behalf. There is no allegation that Craft's counsel were not allowed to inspect all of the evidence, just that Craft was not with them when they inspected it. Craft does not have the right to represent himself and simultaneously be represented by counsel.[28]

Craft argues that his constitutional rights were violated because the court could not place the evidence in the proper perspective since it only saw the photographs the state chose to offer into evidence. The court is not constrained to view as a whole evidence pertaining to the sexual portrayals of children.[29] Thus, this enumeration lacks merit.

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27. (Citations and punctuation omitted.) *State v. Tuzman*, 145 Ga. App. 481, 483 (2) (243 SE2d 675) (1978).

28. (Citation omitted.) *Cargill v. State*, 255 Ga. 616, 622 (3) (340 SE2d 891) (1986).

29. *New York v. Ferber*, 458 U. S. 747, 764 (II) (C) (102 SC 3348, 73 LE2d 1113) (1982); But see *Miller v. California*, 413 U. S. 15, 24 (II) (93 SC 2607, 37 LE2d 419) (1973) (state statutes regulating adult pornography must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.)

6. In Craft's seventh enumeration of error, he argues that the trial court erred by failing to make the required findings of fact in connection with his appeal bond. We disagree.

"Granting or refusing to grant bail in non-capital felony cases after indictment and conviction is a matter within the sound discretion of the trial court; this Court will not control that discretion unless it has been flagrantly abused."[30]

> In exercising its discretion, the trial court must answer four questions: (1) whether there is a substantial risk the defendant will flee; (2) whether there is a substantial risk the defendant will pose a danger to others in the community; (3) whether there is a substantial risk the defendant will intimidate witnesses or otherwise interfere with the administration of justice; and (4) whether it appears the appeal is frivolous or taken only for the purpose of delay.[31]

In this case, the trial judge stated in an earlier bond proceeding that "I am of the opinion that the Defendant poses a danger to the community." After hearing counsel's argument on the motion for an appeal bond, the trial judge referenced the court's earlier denial of Craft's request for bond and stated that the only thing that had changed was the plethora of evidence against Craft that the court had considered during

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30. (Citation omitted.) *Williams v. State*, 228 Ga. App. 289, 290 (2) (491 SE2d 500) (1997).

31. (Citations omitted.) *Abernathy v. State*, 245 Ga. App. 857, 858 (539 SE2d 203) (2000).

the trial. The trial court ruled that even after considering the four factors, it was not appropriate to grant an appeal bond. An affirmative answer to any one of the four questions will support the denial of the bond.[32] Because the trial judge incorporated in the second bond proceeding his earlier finding that Craft posed a threat to the community, we affirm the trial court's denial of Craft's appeal bond.

7. As to Craft's sixth enumerated error, we addressed the issues raised therein in Divisions two, four, and five of this opinion.

*Judgment affirmed in part; reversed in part. Blackburn, C. J., and Pope, P. J., concur.*

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32. Id.

## APPENDIX B — ORDER OF THE COURT OF APPEALS OF THE STATE OF GEORGIA DENYING MOTION FOR RECONSIDERATION DATED DECEMBER 10, 2001

### COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, DEC 10, 2001

*The Court of Appeals hereby passes the following order:*

**AO1A0880, AO1A0881. CRAFT v. THE STATE.**

On motion for reconsideration, Dr. Robert Bruce Craft urges us to reverse his convictions for child molestation on Counts 14, 15, 16, 17, and 18 of the Columbia County indictment. Craft argues that by affirming the convictions, we are holding that anyone who takes or possesses a photograph of a small child lying naked on a bear skin rug is subject to prosecution as a child molester. Furthermore, in doing so he argues, we have disregarded the United States Supreme Court's mandate in *Osborn v. Ohio,* 495 U.S. 103, 127 (110 SC 1691, 109 LE2d 98) (1990) that "nudity alone does not place otherwise protected material outside the mantle of the First Amendment." We disagree.

In Counts 14 through 18, Craft is charged with violating OCGA § 16-6-4 by photographing a minor child while the child was nude, for the purposes of satisfying Craft's sexual desires. OCGA § 16-6-4 provides that "[a] person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or

satisfy the sexual desires of either the child or the person." Craft, a child psychologist, committed the indecent act of taking nude photographs of prepubescent children whom he treated as patients. As we held in *Ney v. State,* 227 Ga. App. 496, 497 (1) (489 SE2d 509) (1997), the intent with which one commits such an act can be inferred. Furthermore, in child molestation cases, evidence of other similar offenses against children is admissible to show the lustful disposition of the defendant. *Baker v. State,* 241 Ga. App. 666, 669 (2) (527 SE2d 266) (1999). Here, hundreds of photographs of nude or partially nude children or their genitalia were admitted into evidence. Thus, the evidence was sufficient to support the trier of fact's inference that Craft took the photographs to satisfy his own sexual desires. Accordingly, the evidence was sufficient to support Craft's convictions and Craft's Motion for Reconsideration is HEREBY DENIED.

## APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF GEORGIA DENYING PETITION FOR CERTIORARI DATED MAY 13, 2002

**SUPREME COURT OF THE STATE OF GEORGIA**
**CLERK'S OFFICE**
**ATLANTA**

DATE: May 13, 2002

Christopher J. McFadden
Suite 800, Commerce Plaza
755 Commerce Drive
Decatur, GA 300302627

Case No. S02C0654

ROBERT BRUCE CRAFT v. THE STATE

COURT OF APPEALS CASE NO. A01A0880 A01A0881

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Fletcher, C.J., Sears, P.J., and Hunstein, J., who dissent.

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Sherie M. Welch, Clerk

## APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF GEORGIA DENYING MOTION FOR RECONSIDERATION DATED JUNE 07, 2002

**SUPREME COURT OF GEORGIA**

Atlanta, June 07, 2002

Case No. S02C0654

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ROBERT BRUCE CRAFT v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Fletcher, C.J., Sears, P.J., and Hunstein, J., who dissent.